PP

v.

OTTAVIO QUATTROCCHI

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD JCA
RAHMAH HUSSAIN JCA
HASHIM YUSOFF JCA
[CRIMINAL APPEAL NO: W-09-37-2002]
30 APRIL 2003

CIVIL PROCEDURE: *Appeal - Appeal to Court of Appeal - Extradition - Whether decision of High Court final and conclusive - Whether there was a right of appeal to Court of Appeal - Extradition Act 1992, s. 37(6)*

The Sessions Court had, on 2 December 2002, discharged unconditionally one Ottavio Quattrocchi ('the respondent') in an extradition matter. The prosecution ('the applicant') filed an application for review of the order made by the Sessions Court *vide* s. 37(1) of the Extradition Act 1992 ('the Act') to the High Court. On 13 December 2002, the High Court judge confirmed the decision of the Sessions Court and dismissed the application for review. On the same day, the applicant filed a notice of appeal against the said decision. On 16 December 2002, the applicant made an application *vide* encl 5(a) ('the said application) and obtained an *ex parte* order under s. 44 of the Courts of Judicature Act 1964 to impound the respondent's travel documents, including his international passport ('the contentious order'). Before this court, the respondent sought to set aside the contentious order and the notice of appeal filed earlier on three grounds, namely, that there was non-disclosure of material facts by the applicant when making the said application; that issue involved had become academic; and that there was no right of appeal against the decision of the High Court in the review proceedings.

The main issue here was whether an appeal could be made to the Court of Appeal against the High Court's decision in an extradition matter.

Held:
Per Abdul Hamid Mohamad JCA

[1] The applicant was not guilty of non-disclosure of the material facts when the *ex parte* application was made. The onus was upon the respondent to prove that the applicant knew for sure that the respondent

had left the country at the time of the application. This, however, it did not do. Therefore, this contention could not be a ground to set aside the contentious order. (p 620 g-h)

[2] The contentious order was not academic. Whilst the purpose of the said order was to prevent the respondent from leaving the country, it was not an injunction which sought to restrain the respondent from leaving the country. The contentious order was for the respondent to surrender his international passport. In absence of a time restriction, it was possible that the respondent would return to Malaysia and surrender his passport, or he may return and the order may be enforced on him. Furthermore, the respondent was the principal director of a company subsisting in Malaysia. Therefore, it could not be said that the said order could not be complied with or enforced at all. (p 621 e-f, h)

[3] The powers and jurisdiction to inquire into an extradition matter is vested in the Sessions Court as stated by s. 18 of the Extradition Act. In an extradition proceeding, there is no right of appeal from the Sessions Court to the High Court. The way to challenge the decision of the Sessions Court is either by way of an application for a writ of habeas corpus (by the fugitive criminal), or by way of a review (by the prosecution). In relation to the latter, the Act provides that the order made by the High Court is final and conclusive. (pp 626 b, c & f)

[4] Whilst the Sessions Court had merely decided on the preliminary objection and not after a full enquiry under s. 19 of the Extradition Act, the fact remained that the trial judge had decided to and discharged the respondent. And it is equally important to note that the High Court judge had decided to uphold the decision of the Sessions judge and denied the applicant's application for a review made under s. 37. In light of s. 37(6), there is no right of appeal against the said decision. (p 629 b-c)

[Order dated 16 December 2002 and notice of appeal struck out.]

*[**Bahasa Translation** of Headnotes*

Pada 2 Disember 2002, Mahkamah Sesyen telah melepaskan Ottavio Quattrocchi ('responden') tanpa syarat dalam suatu kes ekstradisi. Pihak pendakwa ('pemohon') telah membuat permohonan ke Mahkamah Tinggi untuk mengkaji semula perintah Mahkamah Sesyen di bawah s. 37(1) Akta Ekstradisi 1992 ('Akta'). Pada 13 Disember 2002, hakim Mahkamah Tinggi mengesahkan keputusan Mahkamah Sesyen dan menolak permohonan kajian semula tersebut. Pada hari yang sama, pemohon telah memfailkan notis

rayuannya terhadap keputusan tersebut. Pada 16 Disember 2002, pemohon membuat permohonan melalui Lampiran 5(a) ('permohonan tersebut') dan memperoleh perintah *ex parte* di bawah s. 44 Akta Mahkamah Kehakiman 1964 untuk menahan dokumen perjalanan responden, termasuk pasport antarabangsanya ('perintah yang dipertikai'). Di mahkamah ini, responden memohon untuk mengetepikan perintah yang dipertikai dan notis rayuan yang difailkan terdahulu atas tiga alasan, iaitu, bahawa terdapat penyorokan maklumat penting sewaktu membuat permohonan berkenaan; bahawa isu yang berbangkit sudah menjadi akademik; dan bahawa tidak wujud hak untuk merayu terhadap keputusan Mahkamah Tinggi dalam prosiding kajian semula.

Isu utama yang timbul ialah sama ada rayuan ke Mahkamah Rayuan boleh dibuat terhadap keputusan Mahkamah Tinggi dalam kes ekstradisi di sini.

Diputuskan:
Oleh Abdul Hamid Mohamad HMR

[1] Pemohon tidak melakukan apa-apa penyorokan fakta material sewaktu membuat permohonan *ex parte* tersebut. Beban adalah di atas responden untuk membuktikan bahawa pemohon mengetahui dengan pasti bahawa responden telah pun meninggalkan negara semasa permohonan dibuat. Ini bagaimanapun tidak dibuat oleh responden. Oleh itu, hujah ini tidak boleh menjadi alasan untuk mengetepikan perintah yang dipertikai.

[2] Perintah yang dipertikai tidak menjadi akademik. Sementara tujuan perintah tersebut adalah untuk menghalang responden dari meninggalkan negara, ia bukanlah suatu injunksi yang boleh menghalang responden dari meninggalkan negara ini. Perintah yang dipertikai adalah untuk responden menyerahkan pasport antarabangsanya. Dengan ketiadaan had masa, ianya tidak mustahil bahawa responde akan kembali ke Malaysia dan menyerahkan pasportnya, atau ia mungkin kembali dan perintah tersebut akan dilaksanakan ke atasnya. Lagipun, responden adalah pengarah utama sebuah syarikat yang masih beroperasi di Malaysia. Oleh itu, ianya tidak dapat dikatakan bahawa perintah tersebut tidak akan dipatuhi atau tidak dapat dilaksanakan langsung.

[3] Sebagaimana yang tercatit dalam s. 18 Akta Ekstradisi, kuasa dan bidangkuasa untuk meneliti sesuatu hal ekstradisi adalah terletak atas Mahkamah Sesyen. Dalam sesuatu prosiding ekstradisi, tidak ada hak merayu dari Mahkamah Sesyen ke Mahkamah Tinggi. Cara untuk mencabar keputusan Mahkamah Sesyen adalah sama ada melalui

permohonan *habeas corpus* (oleh penjenayah dikehendaki), atau melalui kajian semula (oleh pihak pendakwa). Dalam kes yang terkemudian, Akta memperuntukkan bahawa apa-apa perintah yang dibuat oleh Mahkamah Tinggi adalah muktamad dan konklusif.

[4] Sementara Mahkamah Sesyen hanya memutuskan atas bantahan awal, dan tidak selepas suatu pendengaran penuh di bawah s. 19 Akta Ekstradisi, hakikatnya adalah hakim bicara telah memutuskan untuk dan membebaskan responden. Dan ianya juga penting untuk diperhatikan bahawa hakim Mahkamah Tinggi telah memutuskan untuk mengesahkan keputusan hakim Sesyen dan menolak permohonan pemohon untuk kajian semula di bawah s. 37. Mengambilkira s. 37(6), tidak ada hak untuk merayu terhadap keputusan tersebut.

Perintah bertarikh 16 Disember 2002 dan notis rayuan dibatalkan.]

Case(s) referred to:

Abdi & Anor v. Secretary of State for the Home Department & Anor [1996] 1 All ER 641 ***(refd)***

Chua Han Mow v. Superintendent of Pudu Prison [1980] 1 MLJ 219 FC ***(refd)***

Chuck v. Cremer 1 Coop T Cott 338 ***(refd)***

Hadkinson v. Hadkinson [1952] 2 All ER 567 ***(refd)***

Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd [2001] 4 CLJ 549 CA ***(refd)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645 FC ***(refd)***

Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd [2002] 4 CLJ 401 FC ***(refd)***

R v. Dartmoor Board of Visitors, ex p Smith [1986] 2 All ER 651 CA ***(refd)***

United Malacca Bhd v. Pentadbir Tanah Daerah Alor Gajah & Other Applications [2002] 4 CLJ 177 FC ***(refd)***

Wee Choo Keong v. MBf Holdings Bhd [1993] 3 CLJ 210 SC ***(refd)***

Yong Teck Lee v. Harris Mohd Salleh & Anor [2002] 3 CLJ 422 CA ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 44(1), 50

Criminal Procedure Code, ss. 324, 325

Extradition Act 1992, ss. 3, 13(1), 19(4), (5), 36, 37(1), (6), 41(1), 44(1)

Land Acquisition Act 1960, s. 49(1)

For the applicant - Kamarul Hisham DPP; AG's Chambers

For the respondent - Muhammad Shafee Abdullah (Rabinder Singh); M/s Shafee & Co

Watching brief - Cyrus V Das (Steven Thiru)

Reported by M Maheswaran

JUDGMENT

Abdul Hamid Mohamad JCA:

On 16 December 2002, the Public Prosecutor (applicant) filed an *ex parte* notice of motion (encl. 5(a)) under s. 44(1) of the Courts of Judicature Act 1964 for an order:

> (1) that the travel documents of the Respondent including his international passport(s) and/or restricted passport(s) be surrendered to Court pending the final disposal of the Applicant's appeal to the Court of Appeal herein or further order;

Sitting alone hearing the *ex parte* application, I granted the order as per prayer (1) above. This will be referred to as "the order of 16th December 2002".

On 26 December 2002, the respondent filed a notice of motion (encl. 15(a)) praying for the following orders:

> 1. The ex parte order dated 16.12.2002 be set aside;
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> 2. Notice of Appeal dated 13.12.2002 be struck out;
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> …

This was heard *inter partes*. This judgment is in respect of that motion (encl. 15(a)). However, for the sake of consistency the parties will be referred to as the applicant and respondent as in encl. 5(a).

A brief background of the case is necessary to understand the arguments of the parties.

The respondent, an Italian national, had lived in India since 1964. When in India he had given an undertaking through his counsel to the Supreme Court of India that he would present himself for investigation. However, in breach of the undertaking he failed to turn up as promised. He left India and came to Malaysia on 29 July 1993. The Union of India sought the extradition of the Respondent for offences involving criminal conspiracy. Upon request for extradition by India, the Malaysian Ministry of Home Affairs, on 15 December 2000, issued a Special Direction under s. 3 of the Extradition Act 1992 ("the Act"). A warrant of apprehension was issued by the magistrate under s. 13(1) of the Act on 18 December 2000. The warrant was served and the respondent was arrested on 20 December 2000. He was produced before the magistrate and the case was transmitted to the Sessions Court pursuant to s. 15 of the Act. When the respondent appeared

before the Sessions Court, he was granted bail pending the hearing of the extradition proceedings. He was required to surrender his international passport and deposit a sum of RM400,000 into court.

On the same day (20 December 2000) the respondent through his counsel, gave notice that he would be raising two preliminary objections, namely:

(a) that no charges had been framed against the respondent by the Union of India; and

(b) when the warrant of apprehension was executed, no charges had been read out to the respondent.

The said preliminary objection was heard on 12 February 2001 but the Sessions Court judge reserved his decision to 3 April 2001.

In the meantime, the respondent commenced judicial review proceedings in the High Court and obtained leave as well as an order to stay the extradition proceedings in the Sessions Court. This prevented the Sessions Court from giving its decision on 3 April 2000. The Union of India intervened in the judicial review proceedings and together with the Government of Malaysia opposed the judicial review application. On 21 October 2002 the High Court dismissed the application for judicial review. Subsequently, on 2 December 2002, the Sessions Court judge delivered his decision on the preliminary objections. The Sessions Court judge upheld the preliminary objections of the respondent and decided that the respondent should be discharged unconditionally. Accordingly the respondent's international passport was returned to him.

On 3 December 2002, the applicant filed an application in the High Court for a review of the order of the Sessions Court under s. 37(1) of the Act.

On 10 December 2002 the Honourable Attorney General of Malaysia decided to grant a fiat or written authorization to Dato' Dr. CV Das, counsel for the Union of India, under s. 41(1) of the said Act to appear on his behalf in the review proceedings. This "review" proceedings should not be confused with the earlier "judicial review" proceedings.

On 10 December 2002 the learned judge of the High Court decided that the said fiat was unlawfully issued.

On 13 December 2002 the High Court judge dismissed the review application and confirmed the decision of the Sessions Court. As a result the respondent was released unconditionally. The applicant filed a notice of appeal to this court.

On 16 December 2002 the applicant applied for and obtained the *ex parte* order that the respondent is seeking to set aside now, besides the notice of appeal.

Preliminary Issue

Encik Kamarul Hisham, for the Public Prosecutor (applicant in encl. 5(a)) raised a preliminary issue at the beginning of the hearing of the respondent's application (encl. 15(a)). He argued that the respondent must observe the order of 16 December 2002 first before he should be heard on his application to set aside the said order. He cited the cases of *Chuck v. Cremer* 1 Coop. T. Cott 338; 41 ER 1028 (1846); *Hadkinson v. Hadkinson* [1952] 2 All ER 567 (CA) and *Wee Choo Keong v. MBf Holdings Bhd.* [1993] 3 CLJ 210 (SC).

We do not think that those cases are of any assistance to the Applicant in this case. *Chuck v. Cremer* is an authority for the proposition that a party who knows of a null or irregular order, should apply to discharge it. Whilst such an order is in existence it must not be disobeyed.

Hadkinson v. Hadkinson decided that:

> Held: it was the plain and unqualified obligation of every person against, or in respect of, whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he has purged his contempt; …

Wee Choo Keong is also a contempt case where it was said that a party in contempt cannot be heard until he has purged his contempt.

This is not such a case. Here, it is not in dispute that at the time when the respondent left the country on 14 December 2002 the order of 16 December 2002 had not been made yet. In fact, the *ex parte* application had not been filed yet. The position is also very different from that in *Jasa Keramat Sdn. Bhd. v. Monatech (M) Sdn. Bhd.* [2001] 4 CLJ 549, a judgment of this court which was subsequently confirmed by the Federal Court (see [2002] 4 CLJ 401).

This is not a contempt proceeding. The respondent is applying to set aside an *ex parte* order ordering him to surrender his international passport. He had left the country before even the application, what more the order, was made. To require him to comply first before his application can be heard

would mean that he would have to come back to Malaysia not only to surrender his passport but, effectively, to surrender himself when there is no order placing him on bail and when, in fact, he has been unconditionally discharged.

In the circumstances, we overruled the preliminary objection and proceeded to hear the respondent's application on merits.

Main Grounds

Dato' Muhammad Shafee put forward three main grounds in support of the application. They are, first, there was a non-disclosure of material facts by the applicant when making the application in encl. 5(a). Secondly, the matter is now academic. Thirdly, there is no right of appeal against the decision of the High Court in the review proceedings.

Non-disclosure Of Material Facts

This ground only concerns the application to set aside the order of 16 December 2002.

Learned counsel for the respondent argued that the *ex parte* order of 16 December 2002 should be set aside on the ground of non-disclosure of material facts by the applicant that the respondent had left the country when the application was made. On the question whether the applicant knew or did not know that the respondent had left the country before the application was made, affidavit evidence is conflicting. In their affidavits Dato' Muhammad Shafee and Mr. Ravinder Singh, solicitors for the respondent said that the applicant knew about it. Encik Kamarul in his affidavit said that "there was at all material times uncertainty regarding the respondent's whereabouts due to the conflicting statements made by the respondent … and his solicitors ...".

Based on such affidavit evidence alone, it would not be right for this court to make a definite finding of fact whether the applicant knew that the respondent had left the country when he filed the application on 16 December 2002. In fact, since it is the respondent who alleges it, it can be said that it is not proved that the applicant knew for sure that the respondent had left the country when the respondent made the application on 16 December 2002. In the circumstances, it cannot be said that the applicant is guilty of non-disclosure of a material fact when making the *ex parte* application. So this ground cannot be a ground for us to set aside the order of 16 December 2002.

Academic

It was also argued by the learned counsel for the respondent that the order is purely academic and unenforceable. This is because the fact is, whether known to the applicant or not, at the time when the order was made, the respondent was no longer in the country and is not in the country now. The whole purpose of the order was to prevent him from leaving the country. There is no way in which the order can be enforced, short of the respondent willingly coming back to Malaysia, which is most unlikely.

Encik Kamarul, for the applicant argued that the order is not academic because, first, there is no fixed period for the respondent to comply. It could be complied later if and when the respondent returns to Malaysia. Secondly, it is a matter of public interest that the issues, especially of law, that arise in this proceedings be determined by this court.

The first argument of Encik Kamarul clearly applies to the application to set aside the order of 16 December 2002, while the second argument ie, the public interest issue is only relevant to the application to set aside the notice of appeal.

On the question whether the order is academic, we are of the view that we will have to consider the nature of the order in the light of the circumstances of the case. There is no doubt that the purpose of the order was to prevent the respondent from leaving the country pending the disposal of the appeal. But, the order is not in the form of an injunction to restrain the respondent from leaving the country. If that is the nature of the order, then there is no doubt that it is academic. But, here the order is for the respondent to surrender his international passport. There is no time limit for him to do so. He may choose to return to Malaysia and surrender his passport or he may return and the order may be enforced on him.

In this case, the respondent had come to and lived in Malaysia since 1993 and there is evidence that he is the principal director of E.A.T.I Sdn. Bhd. and that he conducted all his business dealings in Malaysia through this company, even though the company is in a poor financial state – para. 10(4) of the affidavit of Encik Kamarul Hisham, the Deputy Public Prosecutor. In other words, considering the nature of the order and the circumstances of the case, the order is not academic in the sense that it cannot be complied or enforced at all. It would be different if the respondent were a mere tourist on a short stay with no residence, no address and no business in Malaysia and has left the country for good, under which circumstance, the order may be academic.

In the circumstances, we are of the view that the order is not academic.

On the second issue ie, public interest issue, we were referred to a number of English cases by Encik Kamarul, namely *R v. Dartmoor Board of Visitors, ex parte Smith* [1986] 2 All ER 651 (CA), *Abdi and Another v. Secretary of State for the Home Department and Another* [1996] 1 All ER 641 (HL).

We think it is sufficient for us to discuss the House of Lords judgment in *R. v. Secretary of State for the Home Department, ex parte Salem* ("*ex parte Salem*'s case"). In that case, Salem, a Libyan national, arrived in the United Kingdom in April 1997 and claimed political asylum. He was granted temporary admission and awarded income support and related benefits. In May 1997 a Home Office memorandum recorded that asylum had been refused. Some time before 5 September 1997 the Home office informed the Benefits Agency that Salem's claim had been recorded as determined, thereby causing the Agency to cease payment of benefit. Despite that, the Home Office subsequently asked Salem's solicitors for further evidence to enable the Secretary of State to determine the application. In November 1997 Salem was informed by the Agency that his income support had been stopped because his application for asylum had been refused, but it was not until May 1998 that he was informed of that refusal by the Home Office. He appealed to the immigration adjudicator and also applied for judicial review of the Secretary of State's decision to notify the Agency that his application for asylum had been refused. That application was eventually dismissed by the Court of Appeal, and Salem appealed to the House of Lords. Before the appeal was heard, he was granted refugee status by the immigration adjudicator. The question arose whether the House of Lords should hear the appeal because it raised an issue of general importance, namely the time at which a claim for asylum was "determined" by the Secretary of State within the meaning of reg. 70 of the 1987 regulations, even though the appeal was academic.

Held – The House of Lords had a discretion to hear an appeal in a cause where there was an issue of public law involving a public authority even though by the time the appeal was due to be heard there was no longer a lis to be decided directly affecting the rights and obligations of the parties as between themselves. However, the House would exercise that discretion with caution and would not hear appeals if the result would be academic between the parties unless there was good reason in the public interest for doing so, eg, where there was a discrete point of statutory construction not involving a detailed consideration of the facts and where it was likely that the issue would have to be resolved in the near future because a large number of similar cases existed or were anticipated.

We agree with the principle of the case. However, it should be noted that the issue there is whether an appellate court should hear an appeal even though it is academic. The case cited above is not relevant in regard to the application to set aside the order of 16 December 2002. But, it is relevant for the determination of the issue whether the notice of appeal should be struck out.

Considering the number of important issues arising from the present case, in particular whether charges should have been framed against the respondent by the Union of India and read to him when he appeared at the Sessions Court, whether the Sessions Court was empowered to discharge the respondent without holding a full enquiry pursuant to s. 19 of the Act, whether the learned High Court Judge, in the review proceedings, exceeded his jurisdiction in considering matters other than those considered and decided upon by the Sessions Court Judge and whether the learned High Court Judge was right in his interpretation of the phrase "advocate and solicitor" in s. 41(1) of the Act; and further considering that the issues, as far as we know, have never been decided by this or a more superior court, this case should be a proper case for us to exercise our discretion to hear the appeal. But, that is subject to one most important condition, that is, in law there must be a right of appeal to this court. If there is none, then this court has no discretion to exercise.

Is There A Right Of Appeal?

We now come to the most vital issue: whether in an extradition proceeding, there is a right of appeal from the decision of the High Court to the Court of Appeal. This is the main issue in this application. If there is no right of appeal, then the purported notice of appeal must be struck out and the application for an interim order under s. 44(1) of the Courts of Judicature Act 1964 is not maintainable.

It should be noted that sitting alone on 16 December 2002 hearing the application, *ex parte*, I avoided making a definite finding whether the appellant had a right to appeal against the order of the High Court in question. I merely satisfied myself that a notice of appeal had been filed, it had not been struck out and that there was a *de facto* appeal pending. I took that approach because I knew that in a matter of days the same issue would be heard *inter partes* by a three-judge panel. It would be premature, for me, sitting alone, hearing only one side, to make a definite and final decision on the issue. We shall now do what I did not do, then.

Extradition proceeding is a criminal proceeding but it is in the nature of a committal proceeding and a committal proceeding is not a trial – *Chua Han Mow v. Superintendent of Pudu Prison* [1980] 1 MLJ 219 FC.

The powers and jurisdiction to inquire into an extradition matter is vested in the Sessions Court and in accordance with the procedure specified under the Act – s. 18. Section 19(4) and (5) provides as follows:

> (4) If the Sessions Court is of the opinion that a *prima facie* case is not made out in support of the requisition of the country concerned, the Court shall discharge the fugitive criminal.
>
> (5) If the Sessions Court is of the opinion that a *prima facie* case is made out in support of the requisition of the country concerned, the Court shall commit the fugitive criminal to prison to await the order of the Minister for his surrender, and shall report the result of its inquiry to the Minister; and shall forward together with such report any written statement which the fugitive criminal may desire to submit for the consideration of the Minister.

Section 36 of the Act provides:

> 36. A fugitive criminal who is committed to prison under this Act may apply to the High Court for a writ of *habeas corpus* in accordance with the procedure as provided in the Criminal Procedure Code.

Section 37 of the Act provides:

> 37. (1) Where a fugitive criminal is ordered by the Sessions Court to be discharged under subsection 19(4), the Public Prosecutor may, at the request of the country seeking his return, within ten days of the making of the order by the Sessions Court, apply to the High Court for a review of the order of discharge on any question of law, and on such application the High Court may so review the order.
>
> (2) Where the Public Prosecutor desires to make such an application, he shall, at the time of the making of the order of discharge by the Sessions Court, give to the Court notice of his intention to apply to the High Court for a review of the order, and such notice shall operate as a stay of the order of discharge by the Sessions Court:
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> (a) until the expiration of the period of ten days, beginning with the day on which the order of discharge was made; or
>
> (b) if an application for a review of the order of discharge is made, until the determination of the application by the High Court.

(3) Where the Public Prosecutor gives notice of his intention to apply for a review of the order of the Sessions Court, the Court may grant, to the fugitive criminal in respect of whom the order of discharge was made, bail pending the determination by the High Court of the application.

(4) Upon application for a review of the order of discharge, the Sessions Court Judge shall transmit to the High Court the exhibits tendered before him, the evidence admitted in Court, the reasons for his decision and his finding on any question of law which arose during the inquiry.

(5) The High Court to which an application is made for a review of an order of discharge may order the release on bail of the fugitive criminal on such terms and conditions as the Court thinks fit pending determination of the application for review.

(6) The High Court may confirm, vary or quash the order or make a new order in substitution for the order so quashed, and any such order of the High Court shall be final and conclusive.

A few points should be noted here. First, the procedure for the inquiry is as specified under the Act. Secondly, the Sessions Court may make one of the two orders: discharge the fugitive criminal if no *prima facie* case is made out or commit him to prison if a *prima facie* case is made out. Thirdly, there is no provision for appeal from the decision of the Sessions Court to the High Court. Instead, if the fugitive criminal is committed to prison he may apply to the High Court for a writ of *habeas corpus* in accordance with the procedure as provided in the Criminal Procedure Code. The Act is silent regarding appeal from the High Court in the *habeas corpus* proceedings. On the other hand, if the fugitive criminal is discharged by the Sessions Court, the Public Prosecutor may, at the request of the country seeking his return, apply to the High Court for a review. Then s. 37(6) of the Act specifically provides that an order of the High Court either confirming, varying or quashing the order of the Sessions Court or a new order in substitution for the order so quashed shall be final and conclusive. There is no similar provision (ie, that the order of the High Court shall be final and conclusive) in respect of an order of the High Court in the *habeas corpus* application by the fugitive criminal.

Contrast these with the provisions in the Courts of Judicature Act 1964 and the Criminal Procedure Code in respect of ordinary criminal trials. I shall only mention the major points. First, the Sessions Court may acquit or convict the accused person – s. 173 of the Criminal Procedure Code. Secondly, without going into details, in either case, a party dissatisfied with

the decision of the Sessions Court may appeal to the High Court – Chapter XXX of the Criminal Procedure Code and s. 26 of the Courts of Judicature Act 1964. From the decision of the High Court, again without going into details, either party may appeal to the Court of Appeal – s. 50 of the Courts of Judicature Act 1964.

So, is there a right of appeal from the Sessions Court to the High Court from a decision in an extradition proceeding? In our view, the answer is in the negative. The Act, a specific Act, provides the procedure for such an inquiry. The way to challenge the decision of the Sessions Court in such a proceeding is either by way of an application for a writ of *habeas corpus* (on the application by the fugitive criminal) or by way of a review (on the application by the Public Prosecutor). It is these provisions that are applicable, not the provisions of the Criminal Procedure Code or the Courts of Judicature Act 1964.

Is there a further appeal from the High Court to the Court of Appeal? Again, we will have to look at the provisions of the Act first. The Act is silent regarding a decision of the High Court in a *habeas corpus* application by the fugitive criminal. However, as the Act (s. 36) itself provides that the application for *habeas corpus* is to be made in accordance with the procedure as provided by the Criminal Procedure Code, the provisions of s. 374 of the Criminal Procedure Code regarding appeal against a decision in a *habeas corpus* application applies. The case of *Chua Han Mow* is one such example.

On the other hand, regarding a decision of the High Court in an application for a review by the Public Prosecutor there is a specific provision in the Act that the order made by the High Court is final and conclusive.

Do the words "final and conclusive" mean that the orders are not appealable? We are of the view that the answer is obvious, ie, such orders are not appealable. We do not think that any other meaning could be given to the phrase.

In election petition cases, the words "shall be final" have again and again been held to mean unappealable. We need only look at the majority decision of this court in *Yong Teck Lee v. Harris Mohd. Salleh & Anor* [2002] 3 CLJ 422. This is the latest of such cases. Most, if not all earlier judgments were considered. The Federal Court had refused an application for leave to appeal to it (O.M. No. 08-46-2002 (S)). So what is said in the majority judgment of the Court of Appeal is final and law.

I shall not repeat the arguments regarding the provisions of the Constitution with regard to the establishment of this court, the provisions of the Courts of Judicature Act 1964 and of all other arguments that had been put forward in *Yong Teck Lee*'s case. The answers are to be found in that case.

However, we think we should add that subsequent to *Yong Teck Lee*, the Federal Court has delivered its judgment in *United Malacca Bhd. v. Pentadbir Tanah Daerah Alor Gajah & Other Applications* [2002] 4 CLJ 177. It was a five-judge bench. The issue was whether appeals in land acquisition cases would lie to the Court of Appeal or the Federal Court having regard to the provisions of the Land Acquisition Act 1960, the Federal Constitution and the Courts of Judicature Act 1964 and the amendments to all those Acts.

For the sake of clarity, perhaps we should set out the chronology of events:

Before 24 June 1994 – all appeals lay to the Supreme Court.

On 24th June 1994 – pursuant to the amendments to the Federal Constitution and the Courts of Judicature Act 1964, the Supreme Court was renamed "Federal Court". The Court of Appeal was established. Generally speaking, from 24 June 1994, appeals from a decision of the High Court goes to the Court of Appeal.

With effect from 1 March 1998, pursuant to the amendment to the Land Acquisition Act 1960, appeals in land acquisition cases lie to the Court of Appeal.

We would only like to highlight the majority judgments of the Federal Court regarding the effect of the establishment of the Court of Appeal on the provision of s. 49(1) of the Land Acquisition Act 1960. The provision of s. 49(1) of the Land Acquisition Act 1960 prior and subsequent to the creation of the Court of Appeal and until 28 February 1998 was that appeals lay to the Supreme Court/Federal Court. In other words, the fact that the Federal Constitution and the Courts of Judicature Act 1964 were amended to establish the Court of Appeal did not affect the provision of s. 49(1) of the Land Acquisition Act 1960. Appeals continued to lie to the Supreme Court/Federal Court and not to the Court of Appeal. Only after s. 49(1) of the Land Acquisition Act 1960 was amended to provide that appeals should lie to the Court of Appeal (as from 1 March 1998) that such appeals lie to the Court of Appeal.

The point we are making here is this: the amendments to the Constitution and the Courts of Judicature Act 1964 did not affect the provision of s. 49(1) of the National Land Code 1960 regarding appeals. The change only came about when the Land Acquisition Act 1960 itself was amended.

Likewise, we are of the view that the same amendments do not affect the provisions of s. 37(6) of the Act and do not confer the right of appeal in extradition cases.

Megat Najmuddin Dato' Seri (Dr.) Megat Khas v. Bank Bumiputra Malaysia Bhd. [2002] 1 CLJ 645 FC was cited to us. But, we do not think that that case is an authority for the interpretation of the words "shall be final and conclusive".

We are of the view that, for the same reasons given by this court in *Yong Teck Lee*, there is no right of appeal against an order of the High Court confirming the order of the Sessions Court discharging a fugitive criminal. The legislature has made it very clear that that is what it wanted the law to be. It is not for the court to rewrite the law made by the legislature. It is not its function. Neither should it encroach into the jurisdiction of the legislature.

It was argued for the applicant that the provision of s. 37(6) of the Act applies only to a full merit inquiry under s. 19. In this case the Sessions Court did not hold such an inquiry but instead summarily discharged the respondent on preliminary objections relating to the non-existence of the charges. It was also argued that the learned judge of the High Court had failed to confine himself to the issues that were raised before the Sessions Court and instead erroneously embarked on full blown inquiry under s. 19 of the Act and decided on matters that were not strictly before him. The learned High Court judge erred in law when he conducted the review under s. 37 of the Act as if it was an inquiry under s. 19 of the Act and thereby allowed the proceedings to miscarry. In doing so the learned High Court judge exceeded his jurisdiction and power under s. 37 of the said Act. A number of grounds were also forwarded on the merits of the appeal, including that a formal charge was not a pre-requisite to a request for extradition under the Act and that the learned judge had erred in law when he construed the phrase "advocate and solicitor" in s. 41(1) of the Act as not including an advocate and solicitor of the High Court of Malaya.

We must first of all note that we are not, at this stage, hearing the appeal against the decision of the learned High Court judge. Therefore, whether he was right or wrong is not for this court to decide in this application.

We are only hearing the application to set aside the order of 16 December 2002 and the notice of appeal. And, the issue we are now discussing is whether, in law, there is a right of appeal from the decision of the learned High Court judge.

It is true that the Sessions Court had decided merely on the preliminary objection and not after a full enquiry under s. 19. But, the fact remains that he had decided to and discharged the respondent. It is a fact that against that decision there was an application for a review under s. 37, a review was done and the learned High Court judge had given his decision. It is against that decision that the applicant purports to appeal to this court. Is there a right of appeal? That is the question. We are of the view that, in view of the provisions of s. 37(6) of the Act, there is none.

In any event s. 50 of the Courts of Judicature Act 1964, even if applicable (which we think is not), does not help the applicant. Section 50(1) of the Courts of Judicature Act 1964 provides that "the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court:

(a) …

(b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.

The words "or revisionary" were inserted by Act A909 which came into force on 24 June 1994. The word "revisionary" clearly refers to "revision" in Chapter XXXI of the Criminal Procedure Code, especially s. 323. If the word "appeal" includes "revision", there is no reason for the word "revision" to be inserted. The word "appeal" too cannot include "review". As far as we can ascertain, the Criminal Procedure Code does not provide for a review. For the same reason the word "revision" cannot include "review". It appears in the Extradition Act 1992. We are of the view that the word "review" was purposely used to distinguish it from "revision" under the Criminal Procedure Code.

There are clear distinctions between a "revision" under the Criminal Procedure Code and a "review" under the Act.

First, the Criminal Procedure Code does not state at what particular stage of a proceeding in the subordinate court that the High Court may exercise the power of revision. On the other hand, a review under the Act may only be made after the close of the proceedings in the Sessions Court.

Secondly, in the case a revision, the High Court judge himself may call for the record for the purpose of revision. In the case of a review, it has to be on an application by the Public Prosecutor at the request of the country seeking the return of the fugitive criminal.

Thirdly, review is only against an order of a discharge and nothing else. On the other hand, the reasons for which a High Court judge may exercise his power of revision is much wider, ie, "for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that Subordinate Court" – s. 323(1) of the Criminal Procedure Code.

Fourthly, without going into details, the powers of a High Court judge in a revision is much wider than that of a judge hearing a review under the Act – see ss. 36 and 37 of the Act and ss. 324 and 325 of the Criminal Procedure Code. Furthermore as said by the Federal Court in *Chua Han Mow* an extradition proceeding is in the nature of a committal proceeding, not a trial.

We are also of the view that had the legislature intended to include a review under the Extradition Act 1992, it would have inserted the word "review" when it inserted the word "revisionary" in s. 50 of the Courts of Judicature Act 1964.

It was also argued that the Public Prosecutor is also appealing against the order of the High Court in declaring that the fiat given by the Attorney General to Dato' CV Das was unlawful as it does not fall within the provisions of s. 41(1) of the Act. The first thing to be noted is that there is no separate appeal against that decision. There is only one Notice of Appeal and it says:

> SILA AMBIL NOTIS bahawa Perayu yang dinamakan di atas tidak berpuashati dengan keseluruhan keputusan Yang Arif Dato' Augustin Paul yang diberikan di Mahkamah Tinggi Jenayah Kuala Lumpur pada 13hb Disember 2002 di mana Mahkamah telah menolak permohonan Pemohon/ Perayu untuk satu semakan di bawah seksyen 37(1) Akta Ekstradisi 1992 dan seterusnya melepaskan Responden tanpa syarat, kini merayu terhadap keseluruhan keputusan tersebut.

Note that the appeal is against the decision of the learned judge in which he dismissed the application of the applicant for a review under s. 37 of the Act and thereby discharged the respondent unconditionally.

In any case, that ruling is only a subsidiary ruling. The main decision of the High Court is the confirmation of the discharge order by the Sessions Court, which we hold is not appealable. If the main decision is not appealable we do not see how a subsidiary ruling in the decision is appealable. What good would it do anyway? Even if the ruling is appealable and this court decides in favour of the Public Prosecutor, still it will not affect the main decision, it will not make the main decision appealable and be reversed.

If we may be excused for saying so, we think it is very unfortunate that this and higher courts are deprived of the opportunity to determine the important issues that have arisen in this case. It is unfortunate that the determination of such important issues are left only to the High Court to determine and become law. If we may suggest, we think that the legislature should consider amending the Act to provide for appeals in cases such as this. The highest court in the country should have the opportunity to determine such important points of law. What more when the decision affects bilateral relationship between Malaysia and a foreign country. Furthermore, if a fugitive criminal, through *habeas corpus* proceedings, may go to the highest court in the country to challenge an order made against him, we see no reason why the Public Prosecutor, representing the Government of Malaysia at a request of a country with which Malaysia has entered a binding agreement for the extradition of fugitive criminal, should not have similar right where an order is made in favour of the fugitive criminal. But, that is a matter for the legislature to decide. The judiciary should and could say no more. The function of the court is to apply the law as it is.

In the circumstances, the order dated 16 December 2002 cannot stand. After all that is an interim order pending the disposal of the appeal.

The notice of appeal too is void. For this reason alone the order dated 16 December 2002 and the notice of appeal dated 13 December 2002 should be struck out.